86-893

Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

JACKSON WATER WORKS, INC., and
CITIZENS UTILITIES COMPANY,
Petitioners,

VS.

THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA, et al.,
Respondents.

APPENDIX

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Amended Order on Motion for Stay of Mandate of the United States Court of Appeals for the Ninth Circuit, Filed October 29, 1986.

United States Court of Appeals
For the Ninth Circuit

No. 85-1667
CV 84-3439 TEH

Jackson Water Works, Inc.,
a California Corporation and
Citizens Utilities Company
a Delaware Corporation,
Plaintiffs-Appellants,

vs.

The Public Utilities Commission
of the State of California, et al.,
Defendants-Appellees.

[Filed Oct. 29, 1986]

AMENDED

ORDER ON MOTION FOR STAY OF MANDATE
(Rule 41(b) Fed.R.App.P.)

Upon due consideration of appellants motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before November 26, 1986.

IT IS ORDERED that the motion for stay of mandate be, and the same is hereby GRANTED.*

/s/ OTTO SKOPIL
United States Circuit Judge
Otto R. Skopil

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* In the event that the motion for stay of mandate and the petition for writ of certiorari are granted, then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.

Order on Motion for Stay of Mandate of the United States Court of Appeals for the Ninth Circuit, Filed October 28, 1986.

United States Court of Appeals
For the Ninth Circuit

No. 85-1667
CV 84-3439 TEH

Jackson Water Works, Inc.,
a California Corporation and
Citizens Utilities Company
a Delaware Corporation,
Plaintiffs-Appellants,

vs.

The Public Utilities Commission
of the State of California, et al.,
Defendants-Appellees.

[Filed Oct. 28, 1986]

ORDER ON MOTION FOR STAY OF MANDATE
(Rule 41(b) Fed.R.App.P.)

Upon due consideration of appellants motion for stay of the mandate of this Court in the above cause pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari, such petition to be filed in the Clerk's Office of the Supreme Court of the United States on or before November 16, 1986.

IT IS ORDERED that the motion for stay of mandate be, and the same is hereby GRANTED.*

/s/ OTTO SKOPIL
United States Circuit Judge
Otto R. Skopil

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* In the event that the motion for stay of mandate and the petition for writ of certiorari are granted, then this stay will continue pending the final disposition of the case by the Supreme Court of the United States.

Order of the United States Court of Appeals for the Ninth Circuit, Filed October 16, 1986.

United States Court of Appeals
For the Ninth Circuit

No. 85-1667
DC No. CV 84-3439 TEH

Jackson Water Works, Inc.,
a California Corporation and
Citizens Utilities Company
a Delaware Corporation,
Plaintiffs-Appellants,

vs.

The Public Utilities Commission
of the State of California, et al.,
Defendants-Appellees.

ORDER

[Filed Oct. 16, 1986]

Before: SKOPIL, PREGERSON, and WIGGINS, Circuit Judges

A majority of the panel votes to deny the petition for rehearing. An active judge called for a vote on the suggestion for rehearing en banc. A majority of active judges voted to reject that suggestion. The petition for rehearing and suggestion for rehearing en banc are DENIED.

Opinion of the United States Court of Appeals for the Ninth Circuit, Filed October 11, 1986.

To Be Published

United States Court of Appeals
For the Ninth Circuit

No. 85-1667
DC No. CV 84-3439 TEH

Jackson Water Works, Inc.,
a California Corporation, and
Citizens Utilities Company,
a Delaware Corporation,
Plaintiffs-Appellants,

vs.

The Public Utilities Commission
of the State of California, et al.,
Defendants-Appellees.

OPINION

[Filed July 8, 1986]

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted October 11, 1985
San Francisco, California

Before: SKOPIL, PREGERSON, and WIGGINS, Circuit Judges

SKOPIL, Circuit Judge:

This is a challenge by a private utility to the constitutionality of a state statutory scheme which allows public condemnors the choice of adjudicating just compensation in either state court or before the Public Utility Commission. We agree with the district court that the statutes do not facially violate either equal protection or due process. We affirm.

FACTS AND PROCEEDINGS BELOW

Plaintiff-appellant Jackson Water Works ("JWW") is an investor-owned public utility water system serving customers in and around Jackson, California. Plaintiff-appellant Citizens Utilities Company is JWW's sole shareholder. Defendant-appellees are the City of Jackson and its various officers ("City") and the California Public Utility Commission and its members ("PUC").

On April 10, 1984 the City, acting pursuant to Cal. Pub. Util. Code §§ 1403-04 (West 1975), declared its intention to acquire JWW through eminent domain by filing a petition with the PUC. The petition sought a determination by the PUC of the amount of just compensation to be paid by the City. Before such a determination could be made, JWW filed this action in federal district court seeking declaratory and injunctive relief. JWW contended that the administrative procedure offends equal protection because similarly situated utilities are subjected to just compensation determination at the City's option in either state court or before the PUC. JWW further alleged that adjudication of just compensation by the PUC violates due process because it denies an impartial tribunal and meaningful appellate review.

On cross-motions for summary judgment the district court granted the City's motion. JWW timely appealed. Thereafter, the district court granted JWW's motion for an injunction pending appeal that has prevented the PUC from proceeding with the just compensation determination.

STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*. *Lupert v. California State Bar*, 761 F.2d 1325, 1327 (9th Cir.), *appeal dismissed and cert. denied*, 106 S. Ct. 241 (1985). Summary judgment is proper only if there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir. 1985). There are no disputed facts in this case. Resolution therefore depends upon *de novo* examination of questions of law. *See United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 105 S. Ct. 101 (1984). The district court's interpretation

and application of state law is entitled to no special deference; questions of state law are reviewed *de novo*. *Matter of McLinn*, 739 F.2d 1395, 1397 (9th Cir. 1984) (en banc).

DISCUSSION

A. Equal Protection

The equal protection clause of the fourteenth amendment commands that no state shall deny any person the equal protection of the laws. *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3254 (1985). This requires that "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

JWW complains that equal protection is violated by arbitrary discrimination between identically situated public utility condemnees. The alleged discrimination is the result of a statutory condemnation scheme which allows a city condemnor to unilaterally select the forum for the adjudication of just compensation. Significant procedural differences between the forums, JWW argues, give rise to the equal protection violation.

1. Statutory Scheme

A California political subdivision which seeks to exercise its powers of eminent domain to acquire property must institute and conduct an action in the California Superior Court. Cal. Civ. Proc. Code §§ 1230.010-070 (West 1982). Both condemnor and condemnee have the right to a jury determination of just compensation. Cal. Const. art. I, § 19. The condemnee may seek review of the court's determination by an absolute right of appeal to the California Court of Appeals. Cal. Const. art. VI, § 11; Cal. Civ. Proc. Code § 904.1. A discretionary writ of review may be made to the California Supreme Court. Cal. Rules of Court, Rule 28.

When the condemnee is a public utility, the political subdivision may elect the procedures provided by the California Public Utility Code. Cal. Pub. Util. Code §§ 1401-21. That statute provides that upon petition by the City, the PUC, acting in its judicial capacity, will conduct proceedings to determine just

compensation. *Id.* at § 1411. The administrative procedure is commenced at the City's option. It is an "alternative and cumulative and not exclusive" procedure for the determination of just compensation. *Id.* at § 1421. There are no juries. Review is by application for rehearing to the Commission and by writ of review to the California Supreme Court. *Id.* at § 1420.

If the utility refuses to accept the compensation, the City is required to obtain an order of condemnation by commencing an action in Superior Court. *Id.* at § 1413. In such court proceedings the finding of the Commission fixing compensation are "final and shall not be subject to modification, alteration, reversal or review." *Id.* at § 1416.

2. Level of Review

In determining whether the statutory scheme violates equal protection, we must first determine the level of scrutiny to apply. *See San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17 (1973). JWW argues we must apply strict scrutiny because the state's classifications impinges upon fundamental rights. The City contends that the district court correctly applied a rational basis standard.

Traditionally, these two standards, strict scrutiny and rational basis, have been applied when state action is challenged on equal protection grounds. *Hoffman v. United States*, 767 F.2d 1431, 1434 (9th Cir. 1985). Strict scrutiny is applied when the state's classification is deemed to be made on "suspect" grounds such as race, ancestry, alienage, or categorizations impinging upon fundamental rights such as privacy, marriage, voting, travel, and freedom of association. *Id.* at 1434-35.[1] When no suspect class is involved and no fundamental right is burdened, we are obligated to apply a rational basis test to determine the legitimacy of the

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[1] An intermediate level of scrutiny has been applied to gender-based classifications and categorizations involving legitimacy. *Hoffman*, 767 F.2d at 1435; *see also Jones v. Reagan*, 748 F.2d 1331, 1337 (9th Cir. 1984) (describing intermediate level as "heightened" review), *cert. denied*, 105 S. Ct. 3505 (1985).

state's classifications. *Olagues v. Russoniello*, 770 F.2d 791, 802 (9th Cir. 1985).

JWW contends that the classification here impinges on its rights to just compensation, a right expressly protected by the fifth amendment. Such a right has not been deemed "fundamental" for purposes of applying strict scrutiny in an equal protection analysis. More important, as the district court reasoned, JWW does not contend that it is denied just compensation, but only complains of the process. Deficiencies in that process such as lack of a jury trial and limited appeal rights, JWW contends, call for at least heightened scrutiny. But while these alleged deficiencies may give rise to equal protection arguments, *i.e., Lindsey v. Normet*, 405 U.S. 56, 77 (1972) (right of appeal); *Humphrey v. Cady*, 405 U.S. 504, 512 (1972) (jury), neither has been accorded heightened review. *See Hoffman*, 767 F.2d at 1435 (noting that intermediate review has been limited to gender and legitimacy classifications).

We conclude that the district court properly chose to apply the rational basis standard. Where a regulation or statute affects only economic and not fundamental interests, the state is free to create any classification scheme that does not invidiously discriminate. *Burlington Northern Railroad Co. v. Department of Public Service Regulation*, 763 F.2d 1106, 1113 (9th Cir. 1985). The proper test for judging the constitutionality of statutes regulating economic activity challenged on equal protection grounds is whether the legislation bears a rational relationship to a legitimate state interest. *Id.* at 1109; *Jones v. Reagan*, 748 F.2d 1331, 1337 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 3505 (1985). "Because the classification at issue does not interfere with the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, the proper standard for review is the rational basis test. . . ." *In re Lara*, 731 F.2d 1455, 1460 (9th Cir. 1984).

3. Rationality of the Statutory Scheme

Application of the rational basis standard requires a two-step analysis. *Hoffman*, 767 F.2d at 1436 (citing *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 668 (1981)). First, we must determine whether the challenged

legislation has a legitimate purpose. *Id.* Second, assuming a legitimate purpose, we must decide whether the challenged classification promotes that purpose. *Id.* at 1436-37. There need not be a "tight fitting relationship" between the legislative goal and the result. *Id.* at 1437 n.7. All that is needed to uphold the state's classification scheme is to find that there are "plausible," "arguable," or "conceivable" reasons which may have been the basis for the distinction. *Brandwein v. California Board of Osteopathic Examiners,* 708 F.2d 1466, 1472 (9th Cir. 1983) (citations omitted). "Whether these reasons in fact underlay the legislative action is 'constitutionally irrelevant.' " *Id.* (quoting *Flemming v. Nestor,* 363 U.S. 603, 612 (1960)). The moving party carries the burden of proving unconstitutionality under a rationality review because statutes are presumed to be constitutional. *Burlington Northern,* 763 F.2d at 1109; *see also Jones,* 748 F.2d at 1338 (legislation is presumed to be rational).

The California Supreme Court in reviewing the administrative option here concluded that when a city elects to petition the agency to determine just compensation "it simply avails itself of the privileges thereby granted to bring into operation the facilities, expert and technical, which the Commission has on hand in connection with the exercise of its regulatory powers." *East Bay Municipal Utility District v. Railroad Commission of California,* 194 Cal. 603, 229 P. 949, 951 (1924) (referring to PUC's predecessor agency, the Railroad Commission). It appears that the California legislature, in creating the dual forum system, expected that the particular expertise of the PUC would further the interests of justice and economy in some instances but not in others. Presumably, the larger, more complex adjudications would be handled by the PUC. *See Marin Municipal Water District v. Marin Water and Power Co.,* 178 Cal. 308, 173 P. 469, 472 (1918) ("fact that public utilities are subject to constant regulation and examination by the [commission] may well have led the Legislature to conclude that that commission was best able to make a just and equitable appraisement of their property"). JWW apparently does not dispute that the legislature could reasonably have concluded that the PUC's expertise is needed for just compensation determinations in all utility condemnations.

See Marin Municipal Water District, 173 P. at 472 (upholding the utility and non-utility distinction against equal protection attack).

The district court, in rejecting JWW's equal protection claim, relied primarily on the conclusion that the procedural differences in the forums are insufficient to give rise to an ascertainable injury. Assuming that the differences in forums are constitutionally insubstantial, there is ample decisional support for the district court's conclusion. In *American Party of Texas v. White,* 415 U.S. 767, 781 (1974), the Court reasoned that an appellant claiming an equal protection violation bears the burden of demonstrating discrimination "of some substance." The burden is not met by mere assertions that differences exist. A state is not guilty of invidious discrimination in "recognizing these differences and providing different routes." *Id.* at 782 n.13. Similarly, in *American Motorists Insurance Co. v. Starnes,* 425 U.S. 637, 644-45 (1976), the Court reasoned:

> [I]t is fundamental rights which the Fourteenth Amendment safeguards and not the mere forum which a State may see proper to designate for the enforcement and protection of such rights. Given therefore a condition where fundamental rights are equally protected and preserved, it is impossible to say that the rights which are thus protected and preserved have been denied because the State has deemed best to provide for a trial in one forum or another. It is not under any view the mere tribunal into which a person is authorized to proceed by a State which determines whether the equal protection of the law has been afforded, but whether in the tribunals which the State has provided equal laws prevail.

(quoting *Cincinnati Street R.R. Co. v. Sneel,* 193 U.S. 30, 36-37 (1904)).

Nevertheless, there is an argument that the procedural differences are not constitutionally insubstantial. JWW contends that the two forums do not apply the same substantive law because the Commission systematically relies on a methodology of valuation that tends to understate true valuation. The PUC has rejected, however, the possibility that it is entitled to utilize a different method of valuation than mandated by law. *See East Yolo*

Community Services District, 1 Cal. PUC 2d 474, 476-77 (1979) (noting Commission's adoption of method of valuation set by decisional law and later codified at Cal. Civ. Proc. Code § 1263.320). Moreover, in *Community Redevelopment Agency v. Abrahams,* 15 Cal. 3d 813, 543 P.2d 905, 126 Cal. Rptr. 473, 478 (1975), the California Supreme Court stated:

> The fact that the law provides two distinct methods for governmental acquisition of public utilities—proceedings before the commission . . . and judicial eminent domain proceedings . . . —does not, as defendant suggests, "create serious equal protection problems" due to differing substantive measures of recovery according to the method chosen. [I]t was the clear intent of the Legislature to create alternative methods of *procedure,* and that procedure authorized by the Public Utilities Code should not be held to be exclusive of the judicial method . . . . It is manifest that the measure of compensation vouchsafed a public utility by the Public Utility Code . . . is also to be accorded it in proceedings under the Code of Civil Procedure.

Id., 543 P.2d at 910-11 n.6 (citations omitted; quotes and emphasis in original).

JWW argues that the consequences of the City's unilateral forum decision is more than procedural because the City's choice of the agency eliminates the right to a jury and intermediate appellate review. In *Lindsey v. Normet,* 405 U.S. at 79, the Supreme Court struck down an Oregon statute that required a double-bond from a certain class of appellants. The Court reasoned that when an appeal is afforded, it cannot be granted to some litigants and capriciously and arbitrarily denied to others. *Id.* at 77. The Court found the requirement to be arbitrary because it did not satisfy any legitimate state purpose. *Id.* at 77-79.

In *Humphrey v. Cady,* 405 U.S. at 507-11, the Supreme Court examined petitioner's contention that institutionalization under the state's Sex Crimes Act is essentially equivalent to commitment for compulsory treatment under the state's Mental Health Act. Petitioner argued that since the latter provided for a trial by jury, his commitment under the former without a right to a jury

determination violated equal protection. The Court concluded that the claim merited remand for an evidentiary hearing since the equal protection claim appears "especially persuasive if it develops on remand that petitioner was deprived of a jury determination, or of other procedural protections, merely by the arbitrary decision of the State to seek his commitment under one statute rather than the others." *Id.* at 512.

Language in these cases offer JWW substantial support for its position. Nevertheless, they do not necessarily direct a conclusion that the legislative scheme here violates equal protection. First, the state is not obligated under the federal Constitution to provide either a right of appeal or a jury trial. *See Lindsey*, 405 U.S. at 77 (if a full and fair trial on merits is provided, state need not provide appellate review); *Minneapolis & St. Louis Railroad Co. v. Bombolis*, 241 U.S. 211, 217 (1916) (seventh amendment not applicable to the states). Second, the Supreme Court has recognized that the creation of administrative remedies may properly eliminate rights that may have been available in the judicial forum. For example, in *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, 430 U.S. 442, 460 (1977), the Court concluded that the seventh amendment did not prevent Congress from creating rights and remedies by statute, committing their enforcement to a tribunal other than a court, and thereby eliminating factfinding by a jury. The seventh amendment is no bar to the enforcement of new rights in a speedy and expert tribunal. *Id.* at 461.

Most important, it is conceivable that the legislature rationally believed that cities would be in the best position to choose the appropriate forum. Although the legislature did not express criteria to govern the City's choice, this does mean that the City selects the forum for the specific purpose of depriving the utility of a jury or review by the state court of appeals. The selection of the administrative forum also deprives the City of a jury determination and intermediate review. Presumably, the legislature believed that the City would exercise its discretion in an appropriate manner. We agree with the district court that the legislature could have rationally concluded that the public's interest would be better served by allowing the City to select the forum. As the

district court noted, "[w]hile the utility may only consider the narrow interests of its private investors, the municipality is responsible to the public interest in general."[2]

We conclude that the legislation has a legitimate purpose and that the challenged classification reasonably supports that purpose. The forum selection results in no ascertainable injury since the same substantive law is applied. Further, the legislative decision to vest discretion in the public condemnor is a rational method of achieving the legislative purpose of directing a certain class of utility condemnation compensation decisions to the PUC. The state's decision does not have to be perfect; there need only be plausible or conceivable reasons which may have been the basis for the distinction. *Brandwein,* 708 F.2d at 1472. "Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds

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[2] The district court also relied in part on the general practice of allowing the prosecuting party the discretion to proceed in alternative forums. The court examined *Georgia Power Co. v. 54.20 Acres of Land,* 563 F.2d 1178 (5th Cir. 1977), *cert. denied,* 440 U.S. 907 (1979), *rev'd in part on other grounds, Georgia Power Co. v. Sanders,* 617 F.2d 1112 (5th Cir. 1980) (en banc), *cert. denied,* 450 U.S. 936 (1981). There the court reviewed a federal statute that permitted a utility licensee to exercise the power of eminent domain in either federal or state court. In dictum, the court stated that it found no equal protection violation by the plaintiffs choosing "between two or more causes of action with different consequences for defendants." *Id.* at 1193; *see also Sanders,* 617 F.2d at 1122, n.15 (no merit to argument that impermissible forum shopping and denial of equal protection may result from application of different standards of compensation when a licensee has the option of proceeding under state or federal powers of eminent domain).

The district court's analogy is not perfect. The choice of actions created by the federal statute was between state court and federal court. JWW concedes that the equal protection clause does not apply when the dissimilar treatment involved is the result of differences between the laws not of one state, but of different sovereignties. A state's creation of alternative forums may cause constitutional problems if arbitrary selection deprives a litigant of significant procedural protections. *See Humphrey,* 405 U.S. at 512.

can be conceived to justify them." *Clements v. Fashing,* 457 U.S. 957, 963 (1982).

B. Due Process

The due process clause guarantees an aggrieved party the opportunity to present a case and have its merits fairly judged. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 433 (1982). "[*S*]*ome* form of hearing" is required before a person is deprived of a protected property interest. *Id.* (quoting *Board of Regents v. Roth,* 408 U.S. 564, 570-71 n.8 (1972) (emphasis in original). JWW contends that just compensation determinations by the PUC violate procedural due process because (1) the Commission is biased in its reliance on an unfair valuation methodology; (2) the Commission unlawfully combines its legislative and judicial functions; and (3) there is no meaningful appellate review.

1. Bias

Every party is entitled to an impartial tribunal. *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 242 (1980). JWW argues that the PUC is predisposed to using an original cost valuation method which tends to understate the true value of the utility. But, as we noted above, the PUC has adopted and applies the same valuation method used in Superior Court condemnation proceedings. *See East Yolo Community,* 1 Cal. PUC 2d at 476-77. There is no bias in favor of a methodology other than the methodology required by law.

2. Judicial Capacity

JWW complains that the PUC acts in both a legislative capacity (rate setting) and a judicial capacity (just compensation). This dual capacity has been expressly upheld by the California Supreme Court. In *Marin Municipal Water District,* 173 P. at 472, the court acknowledged that fixing the amount payable as just compensation is a judicial question and that due process would be lacking if the state took property without a judicial determination of just compensation. Nevertheless, the court concluded that in a prior decision, *Marin Water and Power Co. v. Railroad Commission,* 171 Cal. 706, 154 P. 864 (1916), it was settled that the Commission's authority to fix just compensa-

tion for utility property taken by eminent domains was derived from Art. 12, § 5 of the California Constitution as a judicial power. *Marin Municipal Water District,* 173 P. at 472. Thus, the Commission is empowered by the state constitution to act in both capacities.

3. Appellate Review

JWW complains that Cal. Pub. Util. Code § 1416's limitation of review is a denial of due process. When a full and fair adjudication on the merits is provided, due process does not require a state to provide appellate review. *Lindsey,* 405 U.S. at 77. Further, we conclude that the review provided is sufficient to meet the requirements of procedural due process. While discretionary writs of review to the California Supreme Court are rarely granted, the denial of a writ of review by that court, even without opinion, is a decision on the merits entitled to res judicata effect. *See Pacific Telephone & Telegraph Co. v. Public Utilities Commission,* 600 F.2d 1309, 1316 (9th Cir.), *cert. denied,* 444 U.S. 920 (1979). Additionally, the PUC adjudicates only how much compensation is justly owed to the utility. All other condemnation proceedings are reserved for the Superior Court with full intermediate appellate review. Cal. Civ. Proc. Code §§ 1230.050; 904.1.

We acknowledge that review by discretionary writ may not provide all the advantages of review by the court of appeals. Nevertheless, the fact that the state need not provide any appellate review and that the review that is provided is on the merits is sufficient to uphold section 1416 against a due process attack.

CONCLUSION

Utility condemnees are not denied equal protection by a legislative scheme that permits the public condemnors the unilateral choice of adjudicating just compensation in either state court or before the PUC. The adjudicatory process before the PUC does not violate the utility's right to procedural due process.

AFFIRMED.

Jackson Water Works, Inc., a California corporation, and Citizens Utilities Company, a Delaware corporation v. The Public Utilities Commission of the State of California, et al., No. 85-1667

PREGERSON, Circuit Judge, dissenting

In approaching this case, it is instructive to examine the following situation. A California city seeks to condemn property owned by two similarly-situated public utilities. The city institutes condemnation proceedings against the first utility in California state trial court, where that utility has a right to a jury trial and an absolute right to appeal the trial court's decision to the California Court of Appeal. The city takes the other utility through compensation proceedings before the Public Utilities Commission, where that utility has no right to a jury trial and may seek only limited review of the PUC's compensation decision through a rarely-granted discretionary writ to the California Supreme Court.[1] The city's choice of forum is completely unilateral and unfettered; the utility/condemnee has no right to alter the city's decision. I believe that such a statutory scheme, which allows identically-situated utility/condemnees to be subject to fundamentally different treatment at the whim of a California political subdivision, violates the equal protection clause of the federal constitution.[2] I therefore dissent.

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[1] The actual operation of the administrative system involved in this case belies any notion that review of condemnation proceedings by discretionary writ is meaningful. It appears that in the seventy year history of this scheme, the California Supreme Court has never reversed a compensation decision of the PUC. In fact, it has granted review in only three cases, and has not reviewed a case in fifty years.

Moreover, the scope of review is much more limited than that afforded to civil litigants appealing from state trial court. The question on petition for review before the California Supreme Court is whether the PUC has "regularly pursued its authority." Cal. Pub. Util. Code § 1757. If the California Supreme Court denies the petition for review, the PUC's decision is final and further review by any California court is not permitted. *See* Cal. Pub. Util. Code § 1416.

[2] Appellants do not challenge the statutory scheme under the California Constitution. Therefore, I decline to address this issue. *Cf. Carreras*

I recognize that under the rational relation standard, the burden on a plaintiff to establish an equal protection violation is significant. The rational relation test, however, is "not a toothless one." *Schweiker v. Wilson,* 450 U.S. 221, 230 (1981) (quoting *Matthews v. Lucas,* 427 U.S. 495, 510 (1976). A state "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary and irrational." *City of Cleburne v. Cleburne Living Center,* 105 S. Ct. 3249, 3258 (1985). The Supreme Court, when faced with various arbitrary and irrational classifications, has not found this standard insurmountable. *See, e.g., Metropolitan Life Insurance Co. v. Ward,* 105 S. Ct. 1676 (1985) (invalidating statute that imposed higher tax rate on out-of-state companies); *Zobel v. Williams,* 457 U.S. 55 (1982) (Alaska may not distribute income from its natural resources to residents on the basis of length of residency). In fact, the Court has struck down state procedures similar to the one employed in this case under the rational relation test. *See Lindsey v. Normet,* 405 U.S. 56, 79 (1972) (striking down state statute that imposed an increased appeal bond only for those appealing from summary ejectment actions); *see also Humphrey v. Cady,* 405 U.S. 504, 512 (1972) (state scheme that arbitrarily denies the right to jury to similarly situated persons would violate the equal protection clause). I believe that the statutory scheme in this case is unconstitutional under *Lindsey* and *Humphrey*, and I am unpersuaded by the majority opinion's efforts to distinguish those cases.

At the outset, I disagree with the suggestion that the important rights denied to utilities proceeding before the PUC are constitutionally insignificant.[3] The importance of the special skills that civil juries bring to the fact-finding process has long been recog-

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v. City of Anaheim, 768 F.2d 1039, 1042-43 (9th Cir. 1985) (if both state and federal constitutional challenges are made, court must address the state ground before reaching the federal constitutional issue).

[3] The majority opinion, while assuming *arguendo* that jury trials and meaningful appellate review are cognizable rights under the equal protection clause, nevertheless concludes that "the forum selection results in no ascertainable injury. . . . " Opinion at 13.

nized.[4] Similarly, the Court has acknowledged that appellate review, if granted by a state, must be fair and effective for all appellants.[5]

The burden imposed by California's dual system on these two important rights, i.e. jury trial and fair and effective appellate review, cannot be justified in light of the Supreme Court decisions in *Lindsey* and *Humphrey*. The majority opinion acknowledges the importance of these two decisions, but nevertheless does not find them controlling in this case for a number of reasons. I will address each of these reasons in turn.

First, the majority opinion, citing *Lindsey*, notes that a state is not obligated to provide either a right of appeal or a right to jury trial. This argument, while certainly correct, misses the mark. A state may deny these rights to its citizens, but if it grants these rights it may not afford them to some and arbitrarily and irrationally deny them to others. This, in fact, was the essence of the holding in *Lindsey* that a state could not require certain appellants to post a higher bond. *Lindsey*, 405 U.S. at 77 ("When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause."); *see Humphrey*, 405 U.S. at 512 ("[Petitioner's] equal protection claim would seem to be especially persuasive if it develops on remand that petitioner was

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[4] *See, e.g., Dimick v. Schiedt*, 293 U.S. 474, 485-86 (1935) (jury trial is "generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases"); *Sioux City & Pacific Railroad Co. v. Stout*, 84 U.S. (17 Wall.) 657, [illegible] (1874) ("It is assumed that twelve men know more of the common affairs of life than does one man."); *In re United States Financial Securities Litigation*, 609 F.2d 411, 431 (9th Cir. 1979) ("[N]o one has yet demonstrated how one judge can be a superior fact-finder to the knowledge and experience citizen-jurors bring to bear on a case."), *cert. denied*, 446 U.S. 929 (1980); *see generally* C. Wright, *Federal Courts* 606 (4th ed. 1983).

[5] *See Lindsey*, 405 U.S. at 74-75; *see also Evitts v. Lucey*, 105 S. Ct. 830, 834, 838-41 (1985) (if a state grants appeals as of right to criminal defendants, equal protection notions require that the appeals process be "adequate and effective" for each appellant) (quoting *Griffin v. Illinois*, 351 U.S. 12, 20 (1956)).

deprived of a jury determination, or of other procedural protections, merely by the arbitrary decision of the State to seek his commitment [to a mental institution] under one statute rather than the other.").

Second, the majority opinion relies on *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977), for the proposition that the seventh amendment permits the creation of rights and remedies which are enforced only through administrative proceedings. I do not argue with this concept and would have no quarrel if the statutory scheme in this case mandated that all utility condemnation proceedings must be brought before the PUC. Unlike *Atlas Roofing*, the statutory scheme in this case does not merely commit the enforcement of certain rights and remedies to one administrative tribunal, but rather permits the same type of action in two significantly different forums. The important rights involved in this case are not denied to *all* utility/condemnees, but only to those utilities to whom the city unilaterally chooses to deny those rights.

Third, the majority opinion suggests that the arbitrary denial by a city of a condemnee's rights to jury trial and fair and effective appellate review is somehow fair because the city is similarly deprived of those rights if it chooses to proceed before the PUC. The statutory scheme, however, arbitrarily permits a city to decide when it will be afforded these rights and when it will not; the utilities have no such choice. Naturally, a city will forego those rights when it is beneficial to do so, and vice versa.

Fourth, the majority opinion places faith in the ability of cities to promote the legislative purpose behind the dual scheme; that is, channeling the more complex condemnation proceedings to the PUC. However, in failing to provide any meaningful guidelines and giving cities unfettered and unreviewable discretion to choose the forum in which to proceed, the statutory scheme permits the cities to act in derogation of the legislative purpose. For instance, a city is permitted under the statute to take smaller cases to the PUC *and* to take more complex cases to a California state trial court. Such a result, of course, is in direct contradiction

to the statute's avowed purpose.[6] If the statute had indicated that cities were to take the more complex cases to the PUC, then it would be rationally related to the purpose of using the PUC's technical expertise. Absent any statutory criteria, however, the majority leaves it up to the unfettered whim of the city whether the legislative purpose will be served in any given case, or at all.

Finally, the majority opinion states that it was conceivable that the legislature would think that "cities would be in the best position to choose the appropriate forum" because "the municipality is responsible to the public interest in general." I find this argument unrealistic. In each case, a city will choose the forum that will produce the best result for it.[7] If a city believes that in a particular case a jury trial will result in a lower compensation award, it will choose to proceed in state trial court; if not, it will go to the PUC.

I believe that the statutory scheme in this case is arbitrary because its relation to the avowed purpose of using the PUC's expertise in complex cases is simply too attenuated. To allow a condemnor the unfettered discretion to grant or deny similarly-situated condemnees the right to a jury trial and to fair and effective appellate review offends both common sense and the equal protection clause. I therefore dissent.

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[6] Similarly, the Court in *Lindsey* stated: "[t]he claim that the double-bond requirement operates to screen out frivolous appeals is unpersuasive, for it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond." *Lindsey*, 405 U.S. at 78.

[7] I do not mean to imply that cities act in bad faith or otherwise abuse the judicial process. Cities, like all other civil litigants, simply avail themselves of those procedures that favor their position.

Order Granting Plaintiff's Motion for an Injunction Pending Appeal, of the United States District Court for the Northern District of California, Filed February 25, 1985.

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Attorneys for Plaintiffs
Jackson Water Works, Inc. and
Citizens Utilities Company

United States District Court
Northern District of California

No. C 84-3439 TEH

Jackson Water Works, Inc.,
a California corporation, et al.,
Plaintiffs,

vs.

The Public Utilities Commission
of the State of California, et al.,
Defendants.

Order Granting Plaintiffs' Motion for an
Injunction Pending Appeal

[Filed Feb. 25, 1985]

The motion of plaintiffs Jackson Water Works, Inc. and Citizens Utilities Company for an injunction pending appeal came on for hearing before this Court on February 25, 1985. After careful consideration of the arguments presented, the Court hereby grants plaintiffs' motion. Accordingly, It Is Hereby Ordered That:

(1) Defendants, their agents, employees and members and all persons acting in concert with them, be and hereby are enjoined, pending the hearing and determination of

plaintiffs' appeal to the United States Court of Appeals for the Ninth Circuit, from proceeding with permitting or participating in any further Public Utilities Commission proceeding or hearing concerning or relating to the petition of defendant The City of Jackson filed with the California Public Utilities Commission to fix just compensation for the acquisition by eminent domain of plaintiff Jackson Water Works, Inc.'s lands, property, and rights or any similar subsequently filed or amended petition.

(2) That this injunction pending appeal may be served by any person selected for the purpose by plaintiff who is eighteen years of age and not a party to this action.

It Is So Ordered.

Date: February , 1985

United States District Judge

Judgment of the United States District Court for the Northern District of California, Filed February 4, 1985.

United States District Court
for the
Northern District of California

Civil Action File No. C-84-3439

Jackson Water Works, Inc., et. al.,
Plaintiffs,

vs.

The Public Utilities Commission et. al.,
Defendants.

Judgment
[Filed Feb. 4, 1985]

This action came on for hearing before the Court, Honorable Thelton Henderson, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged that defendants' motion for summary judgment is granted and plaintiffs' motion for summary judgment is denied.

Dated at San Francisco, this 4th day of February, 1985.

William L. Whittaker
Clerk of Court

By: /s/ THELTON E. HENDERSON
Thelton E. Henderson
United States District Judge

Order of the United States District Court for the Northern District of California, Filed February 1, 1985.

In the United States District Court
For the Northern District of California

No. C 84-3439 TEH

Jackson Water Works, Inc., a California corporation, and Citizens Utilities Company, a Delaware corporation,
Plaintiffs,

vs.

The Public Utilities Commission of the State of California, et al.,
Defendants.

ORDER

[Filed Feb. 1, 1985]

This case involves a constitutional challenge to certain provisions of the California Public Utilities Code which authorize the Public Utilities Commission to determine the just compensation to be paid investor-owned utilities which municipalities or other political subdivisions seek to acquire. Both plaintiffs and defendants have filed cross-motions for summary judgment.[1] The parties having fully briefed the issues, the Court heard oral argument on the motions on November 26, 1984, and took the matter under submission at that time. After careful consideration, and for the reasons set forth below, the Court hereby grants defendants' motion for summary judgment and denies plaintiffs' motion for summary judgment.

I. BACKGROUND AND FACTS

Pursuant to Article 12, § 5 of the California Constitution, the State Legislature enacted sections 1401-1421 of the Public Utilities Code (hereinafter "PU Code"). As noted above, these

[1] There is no substantial dispute over material facts; therefore, this action may properly be disposed of on summary judgment. Federal Rule of Civil Procedure 56.

provisions provide a procedure for adjudicating the just compensation to be paid an investor-owned utility which a municipality (or other qualifying entity) seeks to condemn under its powers of eminent domain. The procedure is essentially as follows: The municipality first files a petition with the Public Utilities Commission (hereafter "PUC") for a determination of just compensation. Subsequently, a valuation proceeding is conducted by an administrative law judge, who makes a recommendation to the PUC. Acting in its judicial capacity, the PUC then passes on the law and the facts and fixes the amount of just compensation. The municipality is still required to obtain an actual order of condemnation from a superior court; however, the court is bound by the amount of compensation fixed by the PUC.

Either party may appeal the PUC's determination of just compensation by applying to the California Supreme Court for a discretionary writ of review. PU Code §§ 1416, 1756 *et seq.* Final appeal is to the United States Supreme Court. The above scheme is hereinafter referred to as the "PUC procedure."

Under PU Code § 1421, the municipality can choose to proceed before the PUC, as described above, or to institute eminent domain proceedings in superior court pursuant to California Code of Civil Procedure §§ 1230.010 *et seq.* If proceedings are instituted in state court, either party may demand a jury and the condemnee has the right to all ordinary avenues of appeal.

In the instant case, defendant City of Jackson decided to acquire plaintiff Jackson Water Works, an investor-owned public utility water system in Amador County which serves the City of Jackson. The City chose to file a petition and proceed before the PUC rather than institute eminent domain proceedings in superior court. In response to the petition, a valuation proceeding has been scheduled for February 1985.

On June 4, 1984, plaintiffs filed the instant complaint pursuant to 42 U.S.C. § 1983 against the PUC,[2] its members,[3] the City of Jackson, and others, seeking declaratory and injunctive relief. Plaintiffs' complaint and motion for summary judgment contend that the PUC procedure violates procedural due process under the Fourteenth Amendment of the United States Constitution because the procedure denies them 1) an impartial and unbiased tribunal, and 2) meaningful appellate review. Plaintiffs also contend that the procedure offends the equal protection guarantees of the Fourteenth Amendment because similarly situated utilities can be subjected to substantially different forums, given the municipality's option to proceed before either the PUC or the superior court.

II. PROCEDURAL DUE PROCESS

A. Bias

Due process entitles plaintiffs to an impartial tribunal, *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); however, plaintiffs have not persuaded the Court of their claim that the PUC is inherently or systemically biased against utilities when it acts in its adjudicatory function to determine just compensation.

Plaintiffs first point to the fact that the PUC uses an "original-cost" valuation formula when it acts in its legislative rate-setting capacity. Plaintiffs infer from this that because the PUC sets rates more often than it conducts valuation proceedings, the PUC will

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[2] Although state officials, such as members of the PUC commission, are clearly "persons" under § 1983, a state agency itself is not. *Ruiz v. Estell*, 679 F.2d 1115, 1137 (5th Cir. 1982) (holding that Board of Corrections was a state agency and not a "person" for § 1983 purposes); *Whitner v. Davis*, 410 F.2d 24, 29 (9th Cir. 1969) (state college is a state agency and not a "person"). This Court finds that the PUC is a state agency. Since the PUC is therefore not a "person" for the purposes of § 1983, it is hereby dismissed from this action.

[3] It is now clearly settled that judicial immunity is not a bar to prospective injunctive relief against the members of the PUC, who act in a judicial capacity when determining just compensation. *Pulliam v. Allen*, 52 U.S.L.W. 4526, 80 L.Ed 2d 565 (1984).

unavoidably favor this formula over some other formula more favorable to utilities when it determines just compensation. However, even assuming, *arguendo,* that the exclusive use of this formula for purposes of valuation, would indicate bias, plaintiffs have failed to demonstrate that any, much less an undue percentage, of the valuation cases have been determined on the basis of the "original-cost" formula. Moreover, a 1979 PUC opinion expressly states that the "Heilbron rule" is the proper means for determining just compensation. This Rule takes into account various formulas, has been codified in § 1263.320 of the California Code of Civil Procedure, and is the method used in state court condemnation proceedings as well. *East Yolo Community Services District,* 1 C.P.U.C. 2d 474, 476-477 (1979). Thus, plaintiffs have failed to demonstrate that PUC use of the original cost formula in setting rates has resulted in or suggests systemic bias against utilities in valuation proceedings.

Secondly, plaintiffs point to the fact that the PUC acts in both a legislative capacity (when it sets rate bases), and in a judicial capacity (when it conducts valuation proceedings). Plaintiffs infer from this dual function that the PUC is therefore biased because it would be reluctant to reconsider any findings it made pursuant to setting the rate base that would be relevant to the valuation proceeding. However, administrative agencies commonly exercise both legislative and adjudicatory functions, and we find that the PUC's dual functions do not render the Agency an inherently biased tribunal. *CF. Marathon Oil Co. v. Environmental Protection Agency,* 564 F.2d 1253, 1265 (9th Cir. 1977).

Plaintiffs' reliance on the principle that just compensation is purely a judicial function which cannot be circumscribed by legislature, *see Baldwin Park Redevelopment Agency v. Irving,* 156 Cal. App. 3d 428, 439 (1984), is misplaced. While it is clear that the legislative body seeking to take public property should have no hand in fixing the amount of just compensation, this is not the situation here. Although the PUC has a legislative capacity, it is not the legislative body seeking to condemn; nor is it in any way involved in, or a beneficiary of, the condemnation. Thus, this Court finds no basis for concluding that because the

PUC acts in both a legislative and judicial capacity, it is rendered an inherently biased forum in violation of due process principles.

Third, plaintiffs point to the fact that the PUC is on record as favoring acquisition of certain utilities. At the outset, We [sic] note that the PUC has only indicated it favors acquisition of a narrow class of utilities to which plaintiffs do not belong. (*See* Defendants' Opposition to Motion for Summary Judgment, exhibits 1, 3). However, more fundamentally, We do not agree with plaintiffs that such a position supports the inference that the PUC could not act impartially when fixing just compensation.

Finally, plaintiffs point to an admission by the PUC that the "staff has in the past presented evidence in valuation proceedings."[4] However, plaintiffs have not demonstrated that any such evidence is presented in suppport of, or creates the appearance of supporting, the entity seeking acquisition.

The above factors, either individually or combined, do not, in this Court's opinion, establish that the PUC is systematically biased against utilities or predisposed toward entities seeking acquisition when determining just compensation. In addition, the Court notes that plaintiffs have not shown that the Commission has anything to gain, either financially or otherwise, from undervaluing utilities for purposes of just compensation. Nor have plaintiffs shown or even alleged that the PUC has actually or systematically undervalued utilities according to prevailing standards for valuation or denied them just compensation. Based on all the above, this Court concludes that plaintiffs have not sustained their allegation that the PUC is systemically biased against utilities in the exercise of its judicial function, and therefore find no violation of due process on this ground.[5]

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[4] See Reply to Plaintiffs' First Request for Admissions, ¶ 12,

[5] In addition to contending that the PUC is systemically or inherently biased, plaintiffs, in passing, also allege that there is sufficient *appearance* of impropriety to warrant finding the PUC procedure is violative of due process. *See Marshall v. Jerrico,* 446 U.S. 247 (1980). The U.S. Supreme Court has found constitutional violations on this ground in *Tumey v. Ohio,* 273 U.S. 510 (1927) and *Ward v. Village of Monroeville,* 409 U.S. 57 (1972). In the former, the Court overturned a

ADEQUACY OF APPELLATE REVIEW

Plaintiffs' second due process claim concerns the scope of appellate review provided by the PUC procedure. To briefly reiterate, PU Code §§ 1416, 1756 *et seq.* allows either party to appeal the PUC's decision by applying for a discretionary writ of review in the California Supreme Court.[6] Writs are rarely granted; however, a denial does not indicate an absence of review. Rather, it indicates that, after reviewing the application and opposing papers, the Court has decided to affirm the PUC based on the papers submitted. Thus, a denial is a decision on the merits although the order denying the petition is without opinion. *People v. Western Air Lines, Inc.*, 42 Cal. 2d 621, 630 (1954), *appeal dismissed*, 348 U.S. 859.

Employing a two-step analysis, plaintiffs first argue that due process entitles them to appellate review because they are denied a full and fair hearing before the PUC. Secondly, they argue that, given their right to appellate review, a balancing of the private and governmental interests at stake indicates that the present appellate procedure is inadequate to satisfy due process standards. *See Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

As plaintiffs concede, it is well settled that "if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide

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conviction rendered by a mayor when the mayor's salary was partially paid by fees and costs incurred when he acted in a judicial capacity. In the latter, the Court invalidated a system in which monies produced by a mayor's court accounted for a "substantial" portion of municipal revenues. The case at bar, however, does not present a situation where the PUC has any financial interest in the outcome, either by its individual members or by the institution as a whole. Nor does this Court conclude that the factors raised by plaintiff to demonstrate actual inherent bias result in an appearnace of impropriety sufficient to establish a constitutional violation.

[6] The Court notes that, under the statutory scheme, all appeals from decisions of the PUC are by application for discretionary writ to the California Supreme Court. Thus, the California Courts of Appeal are presently without jurisdiction to hear such appeals.

appellate review." *Lindsey v. Normet,* 405 U.S. 56, 77 (1972). However, they contend that the PUC does not provide a full and fair hearing because 1) the PUC is inherently biased against utilities when exercising its adjudicatory function, and 2) plaintiffs are prevented from raising every possible defense during the proceeding.

As for the first prong of this argument, this Court has concluded that plaintiffs have failed to establish the inherent bias complained of. *See* discussion, *supra.* The second prong is similarly unpersuasive. Plaintiffs correctly assert that they are precluded from raising the defense that a state statute is unconstitutional in the PUC valuation hearing.[7] However, the *Lindsey, supra,* case that plaintiffs rely on does not hold that a party must be able to raise every possible defense in the *same action;* it only states " '[d]ue process requires that there be an opportunity to present every available defense.' " *Id.* at 66. In fact, the *Lindsey* Court rejected the assertion that Oregon denied its litigants due process by restricting the defenses that could be raised in an unlawful detainer proceeding, noting that "there are available procedures to litigate any claims against the landlord cognizable in Oregon." *Id.* at 65-66. Similarly, the plaintiffs here have the opportunity to litigate such constitutional defenses in state or federal court, as well as on appeal from the PUC decision by way of Application for Writ to the California Supreme Court. PU Code § 1757; *see also Radtke v. Alcoholic Beverage Control Approval Board,* 491 F. Supp. 42 (C.D. CA 1980).

Plaintiffs have predicated their assertion that they are denied a full and fair hearing solely on the two grounds stated above.[8]

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[7] Article III, § 3.5 of the California State Constitution provides that administrative agencies, (such as the PUC) are without power to declare a statute unconstitutional or refuse to enforce a statute on constitutional grounds unless an appellate court has already made such a determination.

[8] Plaintiffs do not attack any other procedural aspect of the PUC valuation proceeding. The court notes that in *Marin Municipal Water District v. Marin Water and Power Co.,* 178 Cal. 308 (1981), the Court held that constitutional considerations did not require the availability of

However, given that the Court is not persuaded by either one, prevailing due process doctrine does not require the state to provide a procedure for appellate review.[9] We acknowledge that review by discretionary writ to the California Supreme Court may not provide certain advantages compared to ordinary review by the court of appeals. However, in light of the above discussion, and the fact that the California Supreme Court must nevertheless pass on the merits before denying the writ, *see Southern California Edison Co. Ltd. v. Railroad Commission,* 6 Cal. 2d 737, 747 (1936). We conclude that the present mechanism for appellate review does not render the PUC procedure constitutionally defective on due process grounds.

EQUAL PROTECTION

Plaintiffs contend that even if the PUC procedure does not offend due process, it nevertheless violates equal protection because it results in similarly situated utilities receiving different treatment. Specifically, § 1401 *et seq.* of the PU Code gives the City of Jackson (and other qualifying political subdivisions), the choice to proceed either before the Commission or in superior court. The effect of this "option," plaintiffs argue, is to create two classes of similarly situated utilities. One class proceeds in state court and can opt for a jury and review by the court of appeals, while the other is brought before the PUC and denied such benefits.

The above classification does not involve a suspect class; nor have plaintiffs alleged denial of any fundamental right.[10] Consequently, under standard equal protection doctrine, the classification must be upheld unless plaintiffs meet their burden of showing

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trial by jury, and that the PUC valuation proceedings did not otherwise violate due process. Issues of bias or the scope of available defenses were not considered by the Court. *Id.* at 315.

[9] Plaintiffs cite no authority holding that due process entitles condemnees, in particular, to appellate review, given a fair hearing.

[10] As noted earlier, plaintiffs do not contend they are denied their right to just compensation. Nor has any due process violation been established.

the classification is not 1) rationally related to 2) a legitimate governmental interest. *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 533 (1973). If there is any "conceivable legitimate purpose that would justify the distinctions made in the state's regulatory scheme," the scheme must be upheld. *In re Lara*, 731 F.2d 1455, 1460 (9th Cir. 1984).

Initially, we must determine whether the government has a legitimate end in having some utilities valued before the PUC while others proceed through state court. Plaintiffs imply that it could not based on its characterization of all investor-owned utilities as "identically situated." However, utilities clearly vary in terms of size, complexity, function, and other factors that may enter into a valuation determination. The Legislature could have conceivably expected that the particular expertise of the PUC would further the interests of justice and economy in some instances but not in others. Thus, it appears that a legitimate governmental interest conceivably underlies the dual forum system.

Plaintiffs further contend, however, that allowing the municipality to choose the forum is not rationally related to such an objective. Given that the PU Code does not provide criteria governing the choice, such choices may be made without consideration of any legitimate governmental objective. Thus, plaintiffs argue, the scheme fails to rationally serve any legitimate interest the government has in having utilities valued in a particular forum.

Although plaintiffs' argument is not without appeal, we decline to find that delegating the forum option to the municipality fatally flaws the PUC procedure. Several factors have entered into this determination. First, the Court questions whether the main differences between the two forums complained of (right to jury and ordinary appeal) have resulted in any ascertainable injury to utilities similarly situated to plaintiffs. The only interest that the parties have in valuation proceeding is a financial interest in the amount of compensation to be paid or received. It is not clear to this Court that proceeding before the PUC causes any injury to this interest. As noted earlier, plaintiffs have not established that those utilities proceeding before the PUC are undervalued rela-

tive to those which proceed in superior court. Nor do they allege denial of just compensation.

Second, it is conceivable that the legislature rationally believed that the designated entities would be well-suited to choose the appropriate forum. Although the legislature did not provide these entities with express criteria to govern their choice, this does not indicate that the legislature intended or expected the acquiring entity to determine a forum arbitrarily or solely for the purpose of depriving the utility of a jury or review by the California court of appeal. After all, the disadvantages plaintiffs complain of cut both ways; a municipality proceeding before the PUC is also precluded from demanding a jury or the ordinary avenue of appeal. Thus, the Legislature could rationally have believed that public entities would exercise their discretion in an appropriate manner in these matters. Moreover, the Legislature may also rationally have believed that as between the two, it would better serve the public's interest to delegate the forum choice to the municipality rather than the utility. While the utility may only consider the narrow interests of its private investors, the municipality is responsible to the public interest in general. Thus, while the Legislature's delegation of the forum choice to the municipality may not always further its objectives, and there may be times where similarly situated utilities are subjected to different forums, it cannot be said that this delegation is irrationally related to legitimate objectives.

Finally, this Court has taken into consideration the fact that our judicial system generally gives the prosecuting party the discretion to make decisions that will affect the procedural and substantive rights of similarly situated defendants. For example, a plaintiff may often have the choice of proceeding in state or federal court, or pursuing one or more of several possible causes of action.

In a case somewhat similar to the case at bar, *Georgia Power Co. v. 54.20 Acres of Land, etc.*, 563 F.2d 1178 (5th Cir. 1978), *cert. denied*, 440 U.S. 907, the Court examined a section of the Federal Power Act which allows certain entities total discretion to " 'exercise . . . the right of eminent domain in the district court . . . *or* in the State courts.' " *Id.* at 1180 (citing 16 U.S.C. § 814

(1970) (emphasis added). The Court held that federal, rather than Georgia, law applied if the plaintiff proceeded in federal court. Although condemnees would thus be subject to less favorable valuation rules, and attorney fees would be unavailable, the Court rejected the argument that a "law permitting Georgia Power [condemning party] to 'grant' the benefits of Georgia law arbitrarily through its choice of forum denies equal protection to landowners sued under the federal rather than the state statute." *Id.* at 1192:

> To the extent the equal protection issue is before us, we find it without merit. There can be no contention that any landowner will be awarded constitutionally inadequate compensation if federal law controls since the federal rules satisfy the requirements of the fifth amendment. *See, e.g., United States v. Miller*, 1943, 317 U.S. 369, 63 S. Ct. 276, 87 L.Ed 336. Nor can we seriously consider the possibility that there are constitutional difficulties whenever a prosecutor or other plaintiff meeting state action requirements may choose between two or more causes of action with different consequences for defendants. If there were, the Justice Department could not constitutionally choose to bring a civil antitrust suit against one offender and a criminal suit against another.

The 5th Circuit subsequently reversed itself on the choice of law issue and decided state law should apply in a district court proceeding as well. However, the switch was not based on any equal protection concerns and the court expressly affirmed it earlier holding on this point. *Georgia Power Co. v. Sanders*, 617 F.2d 1112, 1122 n. 15 (5th Cir. 1980). *Cf. United States v. Batchelder*, 442 U.S. 114, 123-24; *State v. Tague*, 310 N.W. 2d 209, 211-12 (Iowa 1981) (if a defendant violates more than one criminal statute, the prosecutor can prosecute under either even if they carry differing penalties without violating equal protection, so long as the government does not discriminate against any one class of defendants).

All of the above, of course, does not rule out the possibility that a particular entity or group of entities could use its choice of forum to unlawfully discriminate against a certain group or class

of utilities. However, this is not the case before us. Rather, plaintiffs ask us to find that the fact that the choice of forum is within the municipality's discretion is, on its face, a violation of equal protection. For all of the above reasons, this we decline to do.

Accordingly, plaintiffs' motion for summary judgment is HEREBY DENIED and defendants' motion for summary judgment is HEREBY GRANTED.

IT IS SO ORDERED.

Dated: February 1, 1985

/s/ THELTON E. HENDERSON
Thelton E. Henderson
United States District Judge

United States Constitution Amendment V.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution Amendment XIV, § 1.

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Constitution Article I, § 19 (West 1975).

§ 19. Eminent domain; just compensation; possession

Sec. 19. Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

California Constitution Article VI, § 11 (West 1975).

§ 11. Appellate jurisdiction of Supreme Court, courts of appeal and superior courts; findings of fact

The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction and in other causes prescribed by statute.

Superior courts have appellate jurisdiction in causes prescribed by statute that arise in municipal and justice courts in their counties.

The Legislature may permit appellate courts to take evidence and make findings of fact when jury trial is waived or not a matter of right.

California Constitution Article XII §§ 1, 5 (West Supp. 1986).

§ 1. Commission; membership vacancies; removal

The Public Utilities Commission consists of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for staggered 6-year terms. A vacancy is filled for the remainder of the term. The Legislature may remove a member for incompetence, neglect of duty, or corruption, two thirds of the membership of each house concurring.

§ 5. Additional authority and jurisdiction of commission; review; eminent domain

The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain.

California Civil Procedure Code §§ 904.1 (West Supp. 1986), 1230.010-1230.060, 1235.165, 1240.030, 1245.220, 1245.235, 1245.255, 1250.010 (West 1982).

§ 904.1. Superior courts; appealable judgments and orders

An appeal may be taken from a superior court in the following cases:

(a) From a judgment, except (1) an interlocutory judgment, other than as provided in subdivisions (h) and (i), (2) a judgment of contempt which is made final and conclusive by Section 1222, (3) a judgment on appeal from a municipal court or a justice court or a small claims court, or (4) a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition directed to a municipal court or a justice court or the judge or judges thereof which relates to a matter pending in the municipal or justice court. However, an appellate court may, in its discretion, review a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition upon petition for an extraordinary writ.

(b) From an order made after a judgment made appealable by subdivision (a).

(c) From an order granting a motion to quash service of summons or granting a motion to stay or dismiss the action on the ground of inconvenient forum.

(d) From an order granting a new trial or denying a motion for judgment notwithstanding the verdict.

(e) From an order discharging or refusing to discharge an attachment or granting a right to attach order.

(f) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.

(g) From an order appointing a receiver.

(h) From an interlocutory judgment, order, or decree, hereafter made or entered in an action to redeem real or personal property from a mortgage thereof, or a lien thereon, determining the right to redeem and directing an accounting.

(i) From an interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made.

(j) From an order or decree made appealable by the provisions of the Probate Code.

§ 1230.010. Short Title

This title shall be known and may be cited as the Eminent Domain Law.

§ 1230.020. Exercise of power

Except as otherwise specifically provided by statute, the power of eminent domain may be exercised only as provided in this title.

§ 1230.030. Acquisition of property; purchase, eminent domain or other means

Nothing in this title requires that the power of eminent domain be exercised to acquire property necessary for public use. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property.

§ 1230.040. Rules of practice

Except as otherwise provided in this title, the rules of practice that govern civil actions generally are the rules of practice for eminent domain proceedings.

§ 1230.050. Powers of court

The court in which a proceeding in eminent domain is brought has the power to:

(a) Determine the right to possession of the property, as between the plaintiff and the defendant, in accordance with this title.

(b) Enforce any of its orders for possession by appropriate process. The plaintiff is entitled to enforcement of an order for possession as a matter of right.

§ 1230.060. Public utilities commission; effect on jurisdiction

Nothing in this title affects any other statute granting jurisdiction over any issue in eminent domain proceedings to the Public Utilities Commission.

§ 1235.165. "Proceeding"

"Proceeding" means an eminent domain proceeding under this title.

§ 1240.030. Requirements

The power of eminent domain may be exercised to acquire property for a proposed project only if all of the following are established:

(a) The public interest and necessity require the project.

(b) The Project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury.

(c) The property sought to be acquired is necessary for the project.

§ 1245.220. Necessary adoption of resolution

A public entity may not commence an eminent domain proceeding until its governing body has adopted a resolution of necessity that meets the requirements of this article.

§ 1245.235. Notice and hearing; contents; conduct

(a) The governing body of the public entity may adopt a resolution of necessity only after the governing body has given each person whose property is to be acquired by eminent domain and whose name and address appears on the last equalized county assessment roll notice and a reasonable opportunity to appear and be heard on the matters referred to in Section 1240.030.

(b) The notice required by subdivision (a) shall be sent by first-class mail to each person described in subdivision (a) and shall state all of the following:

(1) The intent of the governing body to adopt the resolution.

(2) The right of such person to appear and be heard on the matters referred to in Section 1240.030.

(3) Failure to file a written request to appear and be heard within 15 days after the notice was mailed will result in waiver of the right to appear and be heard.

(c) The governing body shall hold a hearing at which all persons described in subdivision (a) who filed a written request within 15 days after the notice prescribed in subdivision (b) was mailed may appear and be heard on the matters referred to in Section 1240.030. The governing body need not give an opportunity to appear and be heard to any person who fails to so file a written request.

(d) Notwithstanding subdivision (b), the governing body may satisfy the requirements of this section through any other procedure that has given each person described in subdivision (a) reasonable written personal notice and a reasonable opportunity to appear and be heard on the matters referred to in Section 1240.030.

§ 1245.255. Judicial review of validity; abuse of discretion; rescission and adoption of new resolution

(a) A person having an interest in the property described in a resolution of necessity adopted by the governing body of the public entity pursuant to this article may obtain judicial review of the validity of the resolution:

(1) Before the commencement of the eminent domain proceeding, by petition for a writ of mandate pursuant to Section 1085. The court having jurisdiction of the writ of mandate action, upon motion of any party, shall order the writ of mandate action dismissed without prejudice upon commencement of the eminent domain proceeding unless the court determines that dismissal will not be in the interest of justice.

(2) After the commencement of the eminent domain proceeding, by objection to the right to take pursuant to this title.

(b) A resolution of necessity does not have the effect prescribed in Section 1245.250 to the extent that its adoption or contents were influenced or affected by gross abuse of discretion by the governing body.

(c) Nothing in this section precludes a public entity from rescinding a resolution of necessity and adopting a new resolution as to the same property subject, after the commencement of an eminent domain proceeding, to the same consequences as a conditional dismissal of the proceeding under Section 1260.120.

§ 1250.010. Jurisdiction

Except as otherwise provided in Section 1230.060 and in Chapter 12 (commencing with Section 1273.010), all eminent domain proceedings shall be commenced and prosecuted in the superior court.

California Public Utilities Code §§ 1401-1421, 1756, 1757, 1759 (West 1975).

§ 1401. Lands, property and rights defined

As used in this chapter, "lands, property, and rights" includes a part or portion thereof.

§ 1402. Political subdivision defined

As used in this chapter, "political subdivision" means a county, city and county, city, municipal water district, county water district, irrigation district, public utility district, or any other public corporation.

§ 1403. Classes of petitions to acquire public utility

Any political subdivision may, at any time, file with the commission either a petition of the first class, setting forth the intention of the political subdivision to acquire under eminent domain proceedings, or otherwise, the lands, property, and rights of any character whatsoever of any public utility or a petition of the second class, setting forth the intention of the political subdivision to initiate such proceedings as may be required under the law governing the political subdivision for the purpose of submitting to the voters of the political subdivision a proposition

to acquire under eminent domain proceedings, or otherwise, the lands, property, and rights of any character whatsoever of any public utility.

§ 1404. Petition; contents; verifications; copies

Each such petition shall contain the name of the political subdivision appearing as petitioner therein, a description of the lands, property, and rights which the political subdivision intends to acquire, and the names and addresses of all owners and claimants thereof, including each trustee and mortgagee under each deed of trust and mortgage, if known, or a statement that they are unknown. The petition shall pray that the commission fix the just compensation which shall be paid by the political subdivision, under the law, for such lands, property, and rights. The petition shall be signed in the name of the political subdivision and verified by the chairman or other presiding officer or by the secretary or clerk of the legislative or other governing body of the political subdivision. At the time the petition is filed, the petitioner shall also file with the commission additional copies thereof equivalent in number to three more than the number of owners and claimants named in the petition.

§ 1405. Order to show cause; contents

Upon the filing of the petition the commission shall make its order to show cause. The order shall specify the nature of the proceeding, contain a general description of the lands, property, and rights which petitioner desires to acquire by condemnation or otherwise, and direct the owners and claimants named in the petition, who shall also be named in the order, to appear before the commission at a time and place specified in the order, to show cause, if any they have, why the commission should not proceed to hear the petition and to fix the just compensation to be paid for the lands, property, and rights.

The order shall direct the executive director of the commission to serve or cause to be served upon each owner and claimant a copy of the order certified under the seal of the commission to which shall be attached a copy of the petition.

§ 1406. Order to show cause; service

Service of the order to show cause shall be made in accordance with the provisions of the Code of Civil Procedure or by depositing a copy of the order to show cause certified under the seal of the commission with a copy of the petition attached thereto, in the United States mail, enclosed in a sealed envelope, registered, with postage prepaid, addressed to each of the owners or claimants, at the address specified in the petition.

§ 1407. Service by publication; mail service on nonresidents; personal service out of state

If any owner or claimant named in the petition resides out of the State or has departed from the State or cannot after due diligence be found within the State, or conceals himself to avoid service, or is a corporation having no managing or business agent, cashier or secretary or other officer upon whom summons may be served, who, after due diligence, can be found within the State, and the fact appears by affidavit to the satisfaction of the commission, and it also appears by such affidavit or by the petition that a cause of action exists against the owner or claimant on whom the service is to be made or that he is a necessary or proper party to the proceeding, the commission shall make an order that the service be made on such owner or claimant by publication of the commission's order to show cause. The order shall direct that the publication be made in a newspaper designated by the commission as likely to give notice to the person to be served, and for such time as the commission finds to be reasonable, at least once a week, but publication against an owner or claimant residing out of the State or absent therefrom shall not be less than two months. If the address of any owner or claimant, as stated in the petition, is out of the State, the secretary of the commission shall, within 15 days after the making and filing of the order to show cause, deposit or cause to be deposited a copy of that order, certified under the seal of the commission, with a copy of the petition attached thereto, in the United States mail, enclosed in a sealed envelope, registered, with postage prepaid, addressed to such owner or claimant at the address specified in the petition. When publication is ordered, personal service of a copy of the order to show cause and of the petition out of the

State is equivalent to publication and deposit in the United States mail.

§ 1408. Notice of hearing; service

Within 10 days prior to the time set for the first hearing on the petition, which time shall be not less than 30 days after the filing of the petition, the executive director of the commission shall serve or cause to be served upon the petitioner a written notice specifying the time and place of the hearing. In all respects not in this chapter otherwise specified, service and the proof of service shall be made as provided by the Code of Civil Procedure. Upon the completion of service upon the petitioner or upon any owner or claimant named in the petition, the commission shall have full and complete jurisdiction over such petitioner, owner, or claimant, with full and complete jurisdiction, insofar as such petitioner, owner, or claimant is concerned, to make each finding referred to in this chapter. The failure to make service upon any person alleging that he is an owner or claimant but not named in the petition shall in no way affect the jurisdiction of the commission over owners and claimants on whom service has been made.

§ 1409. Hearing; payment of costs; evidence

At the time and place specified in the order to show cause, or at such other time and place as, for good cause, is otherwise ordered by the commission, the commission shall proceed to a hearing on the petition. At such times and in such amounts as is directed by the commission, the political subdivision shall pay to the commission all extra costs as determined by the commission, which the commission incurs to comply with the requirements of this chapter, and if such amounts are not paid by the political subdivision as directed by the commission, the commission may suspend further proceedings on the petition. Evidence may be presented by the political subdivision, by each owner or claimant named in the petition, and by the commission.

§ 1410. Amendment of petition

The commission may, at any time subsequent to the filing of the petition, and prior to making and filing its finding as to just compensation, authorize the amendment of the petition by alter-

ing or modifying the description of the lands, property, and rights, or by adding to or deducting from the lands, property, and rights, and in each other respect including jurisdictional allegations.

§ 1411. Findings; just compensation; severance damages

When the proceeding has been submitted, the commission shall make and file its written finding fixing, in a single sum, the just compensation to be paid by the political subdivision for the lands, property, and rights. If the commission finds that severance damages should be paid, the just compensation for such damages shall be found and stated separately. The just compensation shall be fixed by the commission as of the day on which the petition was filed with the commission.

§ 1412. Acceptance of compensation; payment; execution and delivery of conveyance and release

Within 20 days after the commission has made and filed its finding, the owner of the lands, property, and rights may file with the legislative or other governing body of the political subdivision a written stipulation consenting and agreeing to accept the just compensation fixed by the commission. Upon the filing of the stipulation, the political subdivision shall proceed with all due diligence to provide the necessary funds under the law governing the providing of such funds, for paying the just compensation fixed by the commission. Whenever the just compensation has been tendered by the political subdivision, a deed of grant, bargain, and sale conveying the owner's right, title, and interest in and to the lands, property, and rights to the political subdivision shall be executed and delivered by the owner, and the other claimants who have any right, title, or interest in the property shall execute appropriate instruments conveying or releasing to the political subdivision their respective rights, titles, and interests therein. If the deed or the instruments of conveyance or release are not executed and delivered within 60 days after such tender has been made, the political subdivision may commence an action in a court of competent jurisdiction or proceed under Section 1413.

§ 1413. Failure to accept compensation; initiation of eminent domain proceedings or proceedings for submission of proposition to voters

In the case of a petition of the first class, if the owner does not file the stipulation within such 20 days, the political subdivision, within 60 days after the commission has made and filed its finding, shall commence an action in a court of competent jurisdiction to take such lands, property, and rights, under eminent domain proceedings. In the case of a petition of the second class, if the owner does not file the stipulation within such 20 days, the political subdivision, within 60 days after the commission has made and filed its finding, shall initiate proceedings for the purpose of submitting to its voters a proposition to acquire under eminent domain proceedings the lands, property, and rights. The political subdivision shall not be required, in either case, to delay for more than 20 days after the commission has made and filed its finding, before commencing such further proceedings. In the case of a petition of the second class, if the voters of the political subdivision, as provided by the law governing the political subdivision, vote in favor of any proposition to acquire under eminent domain proceedings, or otherwise, such lands, property, and rights, the political subdivisions shall, within 60 days thereafter, commence an action in a court of competent jurisdiction to take such lands, property, and rights, under eminent domain proceedings, unless the owner has filed with the political subdivision a written stipulation consenting and agreeing to accept the just compensation fixed by the commission.

§ 1414. Failure to initiate proceeding; petition of owner for reimbursement of expenditures; order to show cause

If the political subdivision, in a petition of the first class, fails to file such action in a court of competent jurisdiction within such period of 60 days after the commission had made and filed its finding, or if the political subdivision, in a petition of the second class, fails to proceed diligently to submit the proposition to its voters or fails, if its voters have voted in favor of the acquision of the lands, property, and rights, to file such action in a court of competent jurisdiction within 60 days thereafter, the owner of such lands, property, and rights may file with the commission a

verified petition in writing setting forth that fact. The petition may also set forth in detail the expenditures which the owner has necessarily incurred in the proceeding before the commission.

The commission shall thereupon cause written notice, with a copy of the owners' petition attached thereto, to be served upon the political subdivision, to appear before the commission at a time and place specified in the notice, to show cause why an order should not be made by the commission (a) finding that the political subdivision has failed to pursue diligently its rights, (b) determining that the finding as to just compensation shall no longer be of any force or effect, and (c) determining the resonable expenditures necessarily incurred by the owner which, in the opinion of the commission, should be assessed against the political subdivision. The time specified in the notice shall be not less than 10 days subsequent to the date of service.

§ 1415. Finding and order of commission for reimbursement of expenditures; liability of political subdivision

If the commission determines that the political subdivision, in case of a petition of the first class, has failed to commence the action in a court of competent jurisdiction within 60 days after the commission has made and filed its finding of just compensation, or that the political subdivision, in case of a petition of the second class, has failed to proceed diligently to submit the proposition to its voters or has failed, after its voters have voted in favor of the acquisition of the lands, property or rights, to file such action in a court of competent jurisdiction within 60 days thereafter, the commission shall make and file its order declaring that such finding shall no longer be of any force or effect, and make its finding as to the reasonable expenditures necessarily incurred by the owner in the proceeding before the commission, which should be assessed against the political subdivision. The political subdivision shall thereupon be liable to the owner in the amount thus found by the commission, and the owner may thereupon maintain an action against the political subdivision for such amount in any court of competent jurisdiction.

§ 1416. Finality of compensation finding of commission; eminent domain action; judgment of court; finality of judgment

The finding of the commission fixing the just compensation to be paid by the political subdivision for the lands, property, and rights shall be final and shall not be subject to modification, alteration, reversal, or review by any court of this State. If the court in which the political subdivision has commenced its action, subsequent to the making and filing by the commission of its finding as to just compensation, decides that the political subdivision has the right and power under the law to take the lands, property, and rights, it shall enter a judgment in favor of the complainant in the action, fixing as the just compensation which shall be paid for the taking of the lands, property, and rights, the just compensation fixed by the commission. The judgment may include the allowance of such costs between the parties as is provided for in the law of eminent domain of this State. The judgment of the court insofar as it refers to the just compensation to be paid for the lands, property, and rights, shall be final and shall not be subject to modification, alteration, reversal, or review by any court except as specified in this chapter. The judgment of the court shall include a provision, in substance, that it is subject to modification by reason of such increase or decrease in the just compensation to be paid as may therefter be certified to the court by the commission, as provided in this chapter.

§ 1417. Petition for increase or decrease of compensation; service of petition and notice of hearing; consolidation of petitions

At any time within 30 days subsequent to the entry of such judgment, the owner of the lands, property, and rights may file with the commission a verified petition in writing, alleging that by reason of expenditures made by the owner subsequent to the date of the filing of the original petition with the commission, for the purpose of preserving or improving the lands, property, and rights, or by reason of other acts and occurrences subsequent to that date, the just compensation theretofore fixed by the commission should be increased, and praying that the commission make its finding increasing such compensation. At any time within 30 days subsequent to the entry of the judgment, the political subdivision may file with the commission a verified petition in writing,

alleging that by reason of loss or destruction of the lands, property, and rights, or by reason of depreciation or deterioration thereof or by reason of other acts and occurrences, subsequent to the date of the filing of the original petition, the just compensation theretofore fixed by the commission should be decreased, and praying that the commission make its finding decreasing the compensation. The commission shall in each instance cause a copy of such petition or petitions to be served upon each party other than the petitioner, who was named as the political subdivision, owner, or claimant in the original proceeding before the commission, together with a written notice specifying the time and place of hearing on such petition or petitions, which time shall be within 45 days after the entry of the judgment by the court, and shall cause written notice of the time and place of the hearing to be served upon each petitioner in such petition or petitions. If both such petitions are filed, the commission may consolidate them for hearing and decision.

§ 1418. Finding of increase or decrease; finality

After a hearing, the commission shall make and file its finding fixing, as of the date on which the finding is made and filed, the extent to which the just compensation theretofore fixed should be increased or decreased by reason of the matters alleged in the petition or petitions. If the claim is made that the just compensation theretofore fixed by the commission should be increased by reason of expenditures made by the owner subsequent to the date of the filing of the original petition with the commission for the purpose of preserving or improving the lands, property, and rights the commission may increase the just compensation only to the extent to which the commission determines that such expenditures were beneficial to the lands, property, and rights, and reasonably and prudently made. The finding of the commission fixing the extent to which the just compensation theretofore fixed should be thus increased or decreased shall be final and shall not be subject to modification, alteration, reversal, or review by any court of this State.

§ 1419. Modification of judgment to conform to finding; finality of modified judgment; stay

The commission shall thereupon transmit to the court its finding, certified under the seal of the commission, fixing the extent to which the just compensation theretofore fixed by the commission shall be increased or decreased. The court shall thereupon modify its judgment so as to conform with the finding of the commission. The judgment of the court, as thus modified, insofar as it refers to the just compensation to be paid for the lands, property, and rights, shall be final and shall not be subject to modification, alteration, reversal, or review by any court. The filing of either or both the petitions specified in Section 1417 shall not act as a stay of the judgment in condemnation, but upon the payment of the just compensation fixed in the original judgment of condemnation of the plaintiff in the action shall be entitled to immediate possession of the lands, property, and rights.

§ 1420. Rehearing; judicial review

The provisions of this part with reference to rehearing and review shall be applicable to the findings of the commission made and filed under the provisions of this chapter. Petitions for rehearing shall be filed within 20 days from the date of making and filing the finding as to which a rehearing is desired. If such finding of the commission is set aside by the Supreme Court of the State of California, the matter shall be referred back to the commission for further action in the proceeding before the commission, and the commission may, in taking further action, consider the entire testimony theretofore taken in the proceeding before the commission as well as such further testimony as may be presented in connection with such further action. Should a writ of review be obtained from the Supreme Court of the State of California, the time within which the political subdivision shall file an action in a court of competent jurisdiction or submit the proposition to its voters shall be extended to not more than 60 days beyond the final decision of the Supreme Court upon that writ.

§ 1421. Alternative procedure; eminent domain proceedings

The proceedings provided in this chapter shall be alternative and cumulative and not exclusive, and the political subdivision shall continue to have the right to pursue any other procedure providing for the acquisition under eminent domain proceedings of the lands, property, and rights of any public utility. This chapter shall not be construed as repealing any law of this State providing for such eminent domain proceedings.

§ 1756. Writ of certiorari

Within 30 days after the commission issues its decision denying the application for a rehearing, or, if the application was granted, then within 30 days after the commission issues its decision on rehearing, the applicant may apply to the Supreme Court of this state for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable at a time and place then or thereafter specified by court order and shall direct the commission to certify its record in the case to the court within the time therein specified. For purposes of this article, the date upon which the commission issues its decision denying rehearing, or issues its decision on rehearing, is the date when the commission mails the decision to the parties to the action or proceeding.

§ 1757. Scope of review

No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State.

The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.

§ 1759 Jurisdiction

No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases.

California Rules of Court, Rule 28.

Rule 28. Review by Supreme Court

(a) [Time within which court may order review]

(1) [On own motion] If no petition for review is filed, within 30 days after a decision of a Court of Appeal becomes final as to that court the Supreme Court, on its own motion, may order review of the Court of Appeal decision. Within the original 30-day period or any extension of it the Supreme Court may, for good cause, extend the time for one or more additional periods amounting to not more than an additional 60 days in the aggregate. The total time, including extensions, shall not exceed 90 days after the decision becomes final as to the Court of Appeal.

(2) [On petition] Within 60 days after the filing, as provided in subdivision (b), of the last timely petition for review, the Supreme Court may order review of a Court of Appeal decision. Within the original 60-day period or any extension of it the Supreme Court may, for good cause, extend the time for one or more additional periods amounting to not more than an additional 30 days in the aggregate. The total time, including extensions, shall not exceed 90 days after the filing of the last timely petition for review.

42 U.S.C. § 1983 (1981).

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any

citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.